

1 MICHAEL E. STOBERSKI, ESQ.
2 Nevada Bar No. 004762
3 ZACHARY J. THOMPSON, ESQ.
4 Nevada Bar No. 011001
5 OLSON, CANNON, GORMLEY & DESRUISSEAUX
6 9950 West Cheyenne Avenue
7 Las Vegas, Nevada 89129
8 (702) 384-4012
9 mstoberski@ocgd.com

10 Attorneys for Defendants RE/MAX EXTREME,
11 EDWARD C. REED and BARBARA P. REED

12
13
14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA

16 * * * *

17 TAE-SI KIM, an individual, and) CASE NO. 2:09-CV-2008
18 JIN-SUNG HONG, an individual,)
19 Plaintiffs,)
20 vs.)
21 ADAM B. KEARNEY, an individual;) DEFENDANTS RE/MAX EXTREME,
22 EDWARD C. REED, an individual;) EDWARD C. REED AND BARBARA
23 BARBARA R. REED, an individual;) P. REED'S MOTION TO
24 REED TEAM, dba RE/MAX EXTREME, a) DISMISS
25 Nevada general partnership; FIRST)
26 AMERICAN TITLE, a foreign)
27 corporation; GINA THOMPSON, an)
28 individual; ALVERSON, TAYLOR,)
MORTENSEN & SANDERS, a Nevada law)
firm; and, the Estate of JAMES L.)
ZEMELMAN, ESQ.)
Defendants.)

)

1 COME NOW, Defendants RE/MAX EXTREME, EDWARD C. REED and
2 BARBARA P. REED, by and through their attorneys, OLSON, CANNON,
3 GORMLEY & DESRUISSEAUX, and hereby move to dismiss Plaintiffs'
4 Twenty-Third Cause of Action for Breach of Fiduciary Duties,
5 Twenty-Sixth Cause of Action for Breach of Contract, and Twenty-
6 Seventh Cause of Action for Breach of the Duty of Good Faith and

1 Fair Dealing as under no set of facts as pled are Plaintiffs
2 entitled to relief from these moving Defendants on those cause of
3 action.

4 This motion is made and based on the attached points and
5 authorities, all papers and pleadings on file herein, and such
6 oral argument as the court may entertain at the hearing of the
7 motion.

8 DATED this 14th day of December, 2009.

9
10 OLSON, CANNON, GORMLEY &
11 DESRUISSEAUX

12 By /s/ Michael E. Stoberski
13 MICHAEL E. STOBERSKI, ESQ.
14 Nevada Bar No. 004762
15 ZACHARY J. THOMPSON, ESQ.
16 Nevada Bar No. 011001
17 9950 West Cheyenne Avenue
18 Las Vegas, Nevada 89129
19 Attorneys for Defendants RE/MAX
20 EXTREME, EDWARD C. REED and
21 BARBARA P. REED

22 POINTS AND AUTHORITIES

23 I.

24 INTRODUCTION

25 Tae-Si Kim ("Kim") and Jin-Sung Hong ("Hong") (collectively
26 "Plaintiffs") filed a Complaint on October 15, 2009, which named
27 Edward C. Reed ("Mr. Reed"), Barbara R. Reed ("Mrs. Reed"), Reeds
28 and RE/MAX Extreme ("RE/MAX Extreme") (collectively "RE/MAX
Extreme Defendants"), among others. For the purposes of this
motion only, the facts alleged in Plaintiffs' Complaint are to be
accepted as true. In the Complaint, Plaintiffs allege that the

1 RE/MAX Extreme Defendants represented the Plaintiffs as their
2 real estate licensees in a transaction to purchase property known
3 as APN # 177-19-801-008 ("Subject Property").

4 Plaintiffs entered into a contract for the purchase of the
5 Subject Property. After entering into the purchase agreement,
6 Plaintiffs were not able to obtain conventional financing in time
7 for the closing on the Subject Property, which necessitated other
8 arrangements. Plaintiffs allege that while representing
9 Plaintiffs in the transaction, they directed Plaintiffs to use a
10 mortgage broker named Adam Kearney ("Kearney").

11 Kearney and the Plaintiffs allegedly agreed to an
12 arrangement whereby the right to purchase the Subject Property
13 under the purchase agreement would be assigned to Kearney.
14 Kearney in turn would lend Plaintiffs approximately \$100,000,
15 which would then be applied toward the purchase price of the
16 property, and Kearney would finance the remainder of the purchase
17 price by obtaining a loan from Cumorah Credit Union. Plaintiffs
18 would then have the right or the option to repurchase the Subject
19 Property from Kearney after they were able to obtain conventional
20 financing and other conditions. This agreement was reduced to
21 writing in an Option Agreement, which was allegedly drafted by
22 counsel for RE/MAX International, Inc. The RE/MAX Extreme
23 Defendants were not parties to the Option Agreement.

24 Plaintiffs allege that they ultimately attempted to exercise
25 their rights under the Option Agreement. They were able to
26 obtain the money to pay off the remainder of the amounts due to
27 Kearney, which they allege they in fact paid to Kearney.
28 Kearney, in turn, was supposed to open escrow, transfer title,

1 and pay off any liens, including the Cumorah Credit Union lien.
2 Plaintiffs allege that Kearney failed to pay off the lien and
3 absconded with their funds. Plaintiffs contend that Kearney
4 failed to transfer clear and marketable title to them in
5 violation of the Option Agreement. Plaintiffs allege that this
6 failure to pay off the lien ultimately led to a foreclosure on
7 the Subject Property. As a result of this foreclosure,
8 Plaintiffs allege that they lost the money paid to Kearney and
9 the money that they had placed down on the property. Plaintiffs
10 contend that these actions, among other representations and
11 directives, were part of a fraudulent scheme among the RE/MAX
12 Extreme Defendants and Kearney.

13 Subsequently, on October 15, 2009, Plaintiffs filed their
14 Complaint against the RE/MAX Extreme Defendants repeatedly
15 alleging, among other things, that the RE/MAX Extreme Defendants
16 breached fiduciary duties. However, under Nevada law, real
17 estate licensees are not subject to liability based on common law
18 duties, which include fiduciary duties. When real estate
19 licensees are acting in that capacity in a real estate
20 transaction they are subject only to the duties codified in NRS
21 Chapter 645. See NRS 645.251. Plaintiffs' Twenty-Third Cause of
22 Action for Breach of Fiduciary Duties is predicated upon a common
23 law fiduciary duty. Since real estate licensees are not required
24 to comply with such common law principles, Plaintiffs have failed
25 to state a claim upon which relief may be granted against the
26 licensees Mr. Reed and Mrs. Reed. Consequently, dismissal is
27 appropriate.

28 . . .

1 Additionally, dismissal is appropriate on Plaintiffs'
2 Twenty-Sixth Cause of Action for Breach of Contract. In that
3 action, Plaintiffs essentially allege that the Option Agreement
4 was breached. (See Complaint, §§ 282-283.) However, Plaintiffs
5 have already correctly noted and pled that the RE/MAX Extreme
6 Defendants are not parties to the Option Agreement. (Complaint,
7 § 29.) Since the RE/MAX Extreme Defendants are not parties to
8 the Option Agreement, the Option Agreement cannot serve as the
9 basis for a breach of contract claim against them. Consequently,
10 under no set of facts as alleged by Plaintiffs can they be
11 entitled to relief on their breach of contract claim, making
12 dismissal appropriate. Accordingly, dismissal of Plaintiffs'
13 Twenty-Seventh Cause of Action for Breach of the Duty of Good
14 Faith and Fair Dealing is appropriate because the claim is
15 predicated on the Option Agreement of which the RE/MAX Extreme
16 Defendants were not a party.

II.

STANDARD

19 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a
20 claim may be dismissed for failure to state a claim upon which
21 relief may be granted. "Under Federal Rule of Civil Procedure
22 8(a)(2), a pleading must contain a 'short and plain statement of
23 the claim showing that the pleader is entitled to relief.'"
24 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell*
25 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955
26 (2007)). The pleading standard of Rule 8 does not require
27 detailed factual allegations; however, "it demands more than an
28 unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

1 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "A pleading
2 that offers 'labels and conclusions' or 'a formulaic recitation
3 of the elements of a cause of action will not do.'" *Id.* (citing
4 *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "Nor does a complaint
5 suffice if it tenders 'naked assertion[s]' devoid of 'further
6 factual enhancement.'" *Id.* (citing *Twombly*, 550 U.S. at 557, 127
7 S.Ct. 1955).

8 A complaint will not survive a motion to dismiss for failure
9 to state a claim upon which relief may be granted where the
10 complaint does not "contain sufficient factual matter, accepted
11 as true, to 'state a claim to relief that is plausible on its
12 face.'" *Id.* (citing *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).
13 To determine whether the complaint contains sufficient factual
14 matter to state a claim, the Court first should identify which
15 pleadings are to be accepted as true. *See id.* at 1950. For the
16 purposes of a motion to dismiss, the Court must take all of the
17 factual allegations in the complaint as true; however, the Court
18 is not bound to accept as true a legal conclusion couched as a
19 factual allegation. *Id.* at 1949-50 (citing *Twombly*, 550 U.S. at
20 555, 127 S.Ct. 1955). In other words, "[t]hreadbare recitals of
21 the elements of a cause of action, supported by mere conclusory
22 statements, do not suffice." *Id.* at 1949.

23 After identifying the pleadings, if any, that are to be
24 accepted as true for the purposes of the motion to dismiss, the
25 Court "should assume their veracity and then determine whether
26 they plausibly give rise to an entitlement to relief." *Id.* at
27 1950. For a claim to be plausible on its face, the plaintiff
28 must plead "factual content that allows the court to draw the

1 reasonable inference that the defendant is liable for the
 2 misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556, 127
 3 S.Ct. 1955). "The plausibility standard is not akin to a
 4 'probability requirement,' but it asks for more than a sheer
 5 possibility that a defendant has acted unlawfully." *Id.* "Where
 6 a complaint pleads facts that are 'merely consistent with' a
 7 defendant's liability, it 'stops short of the line between
 8 possibility and plausibility of "entitlement to relief.'" *Id.*
 9 (citing *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955).

10 **III.**

11 **BACKGROUND FACTS**

12 On or about June 24, 2005, while Mr. and Mrs. Reed were
 13 acting as Plaintiff Hong's real estate licensees, Hong entered
 14 into a real estate purchase contract to acquire the Subject
 15 Property for approximately \$435,000. (Complaint, § 43.)
 16 Plaintiffs placed \$10,000 in earnest money down, which at some
 17 point became non-refundable. (Complaint, § 45 and Complaint
 18 Exhibit 6.) The closing on the Subject Property was to occur by
 19 August 12, 2005. (See Complaint, § 443.)

20 Subsequently, Hong attempted to obtain conventional
 21 financing. Hong received pre-approval in a letter from Lee J.
 22 Meyer of AAA Mortgage Corporation on July 1, 2005, for
 23 conventional financing for the purchase of the Subject Property.
 24 (Complaint, § 47.) Unfortunately, the Plaintiffs, or Hong in
 25 particular, were not able to obtain conventional financing for
 26 the Subject Property. The Reeds informed the Plaintiffs that the
 27 financing had fallen through. (Complaint, § 48.) Plaintiffs
 28 allege that the Reeds then advised and instructed Plaintiff Hong

1 to obtain alternative financing. (Complaint, § 49). Plaintiffs
2 contend that the Reeds further instructed Plaintiffs to engage
3 Adam Kearney ("Kearney"), who was a licensed mortgage broker at
4 the time. (Complaint, § 51.)

5 Plaintiffs contacted Kearney and he allegedly offered to
6 obtain a loan for approximately \$315,000 of the remainder of the
7 purchase price to acquire the Subject Property by the August 12,
8 2005 closing date. (Complaint, § 78.) Plaintiffs allege that on
9 or about August 10, 2005, Kearney and the Reeds instructed Hong
10 to assign his right to purchase the property under the initial
11 purchase agreement to Kearney. (Complaint, § 65.) On that date,
12 Hong entered into an Option Agreement, which was drafted by
13 counsel for RE/MAX International, Inc. as an accommodation.
14 (Complaint, § 69-70.)

15 The Option Agreement recitals indicated that Hong had
16 located the Subject Property but that Hong did not have
17 sufficient time to apply for and obtain financing for the
18 proceeds required to close escrow on the Subject Property, which
19 was set to take place on or before August 12, 2005. (See Exhibit
20 1 to Plaintiffs' Complaint.) In spite of that, Hong desired the
21 right to acquire the Subject Property, so the Option Agreement
22 was entered to salvage the transaction so that it could proceed
23 to a timely close of escrow. (See Exhibit 1 to Plaintiffs'
24 Complaint.) To allow the transaction to proceed to a timely
25 close of escrow, Kearney agreed to assume the initial purchase
26 agreement, take title to the Subject Property, finance the
27 property, and grant Hong the option to purchase fee title to the
28 Subject Property. (See Exhibit 1 to Plaintiffs' Complaint.) In

1 other words, Kearney agreed to finance the purchase of the
2 Subject Property and to take title in his name, while Hong would
3 be given the opportunity to purchase the Subject Property back
4 from Kearney. Hong would also be required to place additional
5 money down to cover the portion of the purchase price that was
6 not financed. (See Exhibit 1 to Plaintiffs' Complaint.)

7 Plaintiffs allege that Kearney and the Reeds informed
8 Plaintiffs that the Plaintiffs would have to pay additional money
9 down of \$100,000 by the scheduled closing date of August 12,
10 2005, in order to prevent losing the \$10,000 deposit that had
11 been placed when the initial purchase agreement had been entered
12 into. (Complaint, § 53.) Plaintiffs also allege that on or
13 about August 7, 2005, Kearney and the Reeds informed Plaintiff
14 that an additional \$17,394 was required from the Plaintiffs.
15 (Complaint, § 61.) As with the rest of the transaction, the
16 Plaintiffs did not have the ability to obtain the additional
17 money to be placed down prior to August 12, 2005. (Complaint, §
18 54.) Consequently, other arrangements had to be made in order to
19 acquire the additional \$100,000.

20 Plaintiffs allege that Kearney and the Reeds advised the
21 Plaintiffs to obtain a hard-money loan of \$100,000 through
22 Kearney to cover the amount needed for the additional earnest
23 money deposit. (Complaint, § 57.) On or about August 12, 2005,
24 Plaintiffs allege that Kearney provided the \$100,000 to Hong in
25 exchange for a Note and associated compensation, including seven
26 points and ten percent interest. (Complaint, § 58; see Complaint
27 Exhibit 7.) Plaintiffs do not allege that the RE/MAX Extreme
28 Defendants purchased the Note or in any other way were a party to

1 the Note. Regardless, Plaintiffs allege that they obtained the
2 additional money to be placed on the Subject Property for the
3 closing as provided for in the Option Agreement.

4 Under the terms of the Option Agreement, Hong could exercise
5 the option within one year by paying \$10,000 to Kearney and the
6 remaining principal and any interest accrued on the Note as of
7 the date of closing. (Complaint, § 79.) Plaintiffs allege that
8 they complied with those terms. (Complaint, § 79.) Plaintiffs
9 allege that on March 14, 2006, they delivered \$330,000 to
10 Kearney. (Complaint, 107.) They allege that since they
11 complied with the terms and executed the option, Kearney was
12 required to open an escrow with First American Title Company,
13 convey the Subject Property to Hong by grant, bargain, and sale
14 deed, have the escrow agent issue a policy of title insurance,
15 and reconvey the Subject Property to Hong free and clear of the
16 loan. (Complaint, § 80.)

17 Plaintiffs allege that Kearney failed to perform as required
18 by the Option Agreement. (Complaint, § 80.) They allege that he
19 failed to perform pursuant to the terms of the Option agreement
20 by failing to clear title to the Subject Property and by failing
21 to transfer clear and marketable title to Plaintiffs. Plaintiffs
22 recognize that the RE/MAX Extreme Defendants were not parties to
23 the Option Agreement. (Complaint, § 29.)

24 Later, Plaintiffs were allegedly informed by an employee of
25 First American Title Company that the Subject Property was not
26 clear of liens. (Complaint, § 126.) Plaintiffs allege that they
27 hired an attorney, who informed the Plaintiffs in July of 2006
28 that the liens had been cleared and that the Subject Property had

1 been transferred with clear and marketable title to Plaintiffs.
2 (Complaint, § 139.) Plaintiffs contend that the RE/MAX Extreme
3 Defendants also informed them that the title had been cleared.
4 (Complaint, § 119.)

5 Plaintiffs allege that title had not in fact been cleared
6 and that the Subject Property was still subject to a lien from
7 Cumorah Credit Union, which was the entity that had allegedly
8 provided the loan to Kearney to finance the purchase of the
9 Subject Property. (See Complaint, § 140.) Plaintiffs allege
10 that instead of paying off the Cumorah Credit Union loan as
11 Kearney was required to do before transferring title to
12 Plaintiffs, Kearney instead absconded with the \$315,000 in
13 principle, commissions, and other fees.

14 Plaintiffs allege that this failure to pay off the Cumorah
15 Credit Union loan ultimately led to a foreclosure on the Subject
16 Property. (See Complaint, § 146.) They allege that on December
17 16, 2008, they received a notice of foreclosure for the lien, and
18 the Subject Property was ultimately foreclosed upon. (See
19 Complaint, §§ 146, 150.) They allege that this foreclosure
20 essentially wiped out Plaintiffs' prior cash investment that was
21 placed down on the Subject Property as well as the money that was
22 paid to Kearney to exercise their option under the contract.
23 (See Complaint, § 146.)

24 . . .

25 . . .

26 . . .

27 . . .

28 . . .

III.

ARGUMENT

A. PLAINTIFFS' CLAIM FOR BREACH OF FIDUCIARY DUTIES AGAINST THE RE/MAX EXTREME DEFENDNATS SHOULD BE DISMISSED BECAUSE THE CLAIM IS PRECLUDED BY STATUTE.

NRS 645.251 removed any requirement for a licensee to comply with common law duties in Nevada. Specifically, NRS 645.251 states, "[a] licensee is not required to comply with any principles of common law that may otherwise apply to any of the duties of the licensee as set forth in NRS 645.252, 645.253 and 645.254 and the regulations adopted to carry out those sections." NRS 645.251. In other words, a real estate licensee is not subject to causes of action based upon common law duties; instead, real estate licensees are subject only to causes of action based upon the statutory duties contained in NRS 645.252, 645.253 and 645.254.

16 A claim for breach of fiduciary duty is based on a common
17 law fiduciary duty. See *Frantz v. Johnson*, 116 Nev. 455, 465,
18 999 P.2d 351, 357-58 (2000) (recognizing breach of fiduciary duty
19 as a common law cause of action). In the real estate licensee
20 context, such a common law fiduciary duty would have arisen based
21 upon a relationship between the parties where trust and
22 confidence is imposed. Although the legislature could have
23 retained such a common law duty and the principles developed in
24 relation thereto, it chose not to by adopting NRS 645.251, which
25 eliminated such common law duties and supplied statutory duties
26 instead. Now, real estate licensees in Nevada are subject only
27 to the duties set forth in NRS 645.252, 645.253 and 645.254 when
28 acting in their roles as real estate licensees. See NRS 645.251.

1 In this case, Plaintiffs pled that they expected trust and
 2 confidence in the integrity and fidelity of the RE/MAX Extreme
 3 Defendants, which is how, in part, fiduciary duties would have
 4 arisen at common law. (Complaint, § 265.) Plaintiffs pled that
 5 the RE/MAX Extreme Defendants voluntarily undertook those duties
 6 and that they breached them. (See Complaint, §§ 264-266.)
 7 Plaintiffs did not identify a statutory basis for their breach of
 8 fiduciary duties claim, which is likely because fiduciary duties
 9 are not contemplated under NRS Chapter 645. Given that
 10 Plaintiffs did not identify a statutory basis for the claim and
 11 that they appear to have pled that fiduciary duties arose as a
 12 result of placing trust and confidence in the RE/MAX Extreme
 13 Defendants, Plaintiffs' claim is based on a common law duty.
 14 Real estate licensees are not required to comply with such common
 15 law duties when acting as a licensee in a transaction. As a
 16 result, under no set of facts as pled can Plaintiffs be entitled
 17 to relief on their breach of fiduciary duties claim.
 18 Consequently, dismissal for failure to state a claim is
 19 appropriate with respect to Plaintiffs' Twenty-Third Cause of
 20 Action for Breach of Fiduciary Duties against the RE/MAX Extreme
 21 Defendants.

22 **B. PLAINTIFFS' CLAIM FOR BREACH OF CONTRACT AGAINST THE RE/MAX**
 23 **EXTREME DEFENDANTS SHOULD BE DISMISSED BECAUSE THE RE/MAX**
 24 **EXTREME DEFENDANTS ARE NOT PARTIES TO THE OPTION CONTRACT**
 25 **ALLEGEDLY BREACHED.**

26 In Nevada, where a party does not allege facts necessary to
 27 establish the formation of a contract between the parties, that
 28 party's breach of contract claim necessarily fails. See *Snyder*
 v. *Viani*, 110 Nev. 1339, 1344, 885 P.2d 610, 613 (1994). With

1 respect to the formation of a contract, " [b]asic contract
 2 principles require, for an enforceable contract, an offer and
 3 acceptance, meeting of the minds, and consideration." *May v.
 4 Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Since a
 5 breach of contract claim requires the existence of an enforceable
 6 contract, which in turn requires an offer and acceptance, meeting
 7 of the minds, and consideration, the complaint must at least
 8 generally allege facts sufficient to support such elements.

9 In this case, the only contract Plaintiffs have alleged to
 10 have been breached is the Option Agreement. (Complaint, §§ 281-
 11 283.) However, Plaintiffs have explicitly acknowledged in their
 12 Complaint that the RE/MAX Extreme Defendants were not parties to
 13 the Option Agreement. (See Complaint, § 29.) Since they were
 14 not parties to the Option Agreement under Plaintiffs' own facts,
 15 there certainly could not have been an offer or acceptance,
 16 meeting of the minds, or consideration to establish the existence
 17 of a valid and binding contract among the Plaintiffs and the
 18 RE/MAX Extreme Defendants that could form the basis for a breach
 19 of contract claim as pled. As a result, dismissal of Plaintiffs'
 20 Twenty-Sixth Cause of Action for Breach of Contract is
 21 appropriate with respect to the RE/MAX Extreme Defendants.

22 C. **PLAINTIFFS' CLAIM FOR BREACH OF THE DUTY OF GOOD FAITH AND**
FAIR DEALING SHOULD BE DISMISSED BECAUSE THE OPTION CONTRACT
DID NOT GIVE RISE TO THE DUTY WITH RESPECT TO THE RE/MAX
DEFENDANTS.

25 It is well settled in Nevada that every contract imposes the
 26 duty of good faith and fair dealing upon the contracting parties.
 27 *State, University and Community College System v. Sutton*, 120
 28 Nev. 972, 989, 103 P.3d 8, 19 (2004); see also *Hilton Hotels*

1 *Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043, 1046, 862
2 P.2d 1207, 1209 (1993) ("It is well established within Nevada
3 that every contract imposes upon the *contracting parties* the duty
4 of good faith and fair dealing.") (emphasis added). In other
5 words, the covenant of good faith and fair dealing only arises
6 between or among parties to a contract, not non-parties.

In this case, Plaintiffs' allege that the RE/MAX Extreme Defendants, among others, breached a duty of good faith and fair dealing by contravening the spirit and intent of the Option Agreement. (See Complaint, § 286.) In other words, Plaintiffs are alleging that a duty of good faith and fair dealing existed based upon the Option Agreement. As discussed above, Plaintiffs have acknowledged that the RE/MAX Extreme Defendants were not parties to the Option Agreement. (See Complaint, § 29.) Since they were not parties to the contract that gave rise to the alleged duty of good faith and fair dealing, under Nevada law, they could not be held liable under a theory of breach of the duty of good faith and fair dealing. As a result, under no set of facts as pled by Plaintiffs could they be entitled to recover against the RE/MAX Extreme Defendants for breach of the duty of good faith and fair dealing arising from the Option Agreement. Thus, dismissal of Plaintiffs' Twenty-Seventh Cause of Action for Breach of the Duty of Good Faith and Fair Dealing is appropriate.

IV.

CONCLUSION

26 Plaintiffs have repeatedly alleged that the RE/MAX Extreme
27 breached fiduciary duties. Under Nevada law, real estate
28 licensees are not subject to common law duties, including

1 fiduciary duties, when they are acting in that capacity in a real
2 estate transaction; rather, they are subject only to the duties
3 codified in NRS Chapter 645. Plaintiffs pled the breach of
4 common law fiduciary duties though required compliance with such
5 duties have been eliminated. Consequently, dismissal of
6 Plaintiffs' Twenty-Third Cause of Action for Breach of Fiduciary
7 Duties for failure to state a claim upon which relief may be
8 granted is appropriate.

9 Dismissal of Plaintiffs' Twenty-Sixth Cause of Action for
10 Breach of Contract is also appropriate. The basis of Plaintiffs
11 breach of contract claim is the Option Contract. Plaintiffs
12 recognized and pled that the RE/MAX Extreme Defendants were not
13 parties to the Option Agreement. Since were not parties to the
14 Option Agreement, the Option Agreement cannot serve as the basis
15 for a breach of contract claim against them. As a result,
16 Plaintiffs' Twenty-Sixth Cause of Action for Breach of Contract
17 should be dismissed for failure to state a claim upon which
18 relief may be granted as under no set of facts as pled could
19 Plaintiffs be entitled to relief.

20 Dismissal of Plaintiffs' Twenty-Seventh Cause of Action for
21 Breach of the Duty of Good Faith and Fair Dealing is appropriate
22 because the claim is based upon an implied duty arising from the
23 Option Agreement. In Nevada, the implied duty of good faith and
24 fair dealing arises only between the parties to a contract. The
25 RE/MAX Extreme Defendants were not a party the Option Contract.
26 As a result, Plaintiffs' Twenty-Seventh Cause of Action for
27 Breach of the Duty of Good Faith and Fair Dealing should be
28 . . .

Law Office of
OLSON, CANNON, GORMLEY & DESRUSSEAUX
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

1 dismissed for failure to state a claim upon which relief may be
2 granted.

3 DATED this 14th day of December, 2009.

4 OLSON, CANNON, GORMLEY &
5 DESRUISSEAUX

6 By /s/ Michael E. Stoberski
7 MICHAEL E. STOBERSKI, ESQ.
8 Nevada Bar No. 004762
9 ZACHARY J. THOMPSON, ESQ.
10 Nevada Bar No. 011001
11 9950 West Cheyenne Avenue
12 Las Vegas, Nevada 89129
13 Attorneys for Defendants RE/MAX
14 EXTREME, EDWARD C. REED and
15 BARBARA P. REED

16
17
18
19
20
21
22
23
24
25
26
27
28

OLSON, CANNON, GORMLEY & DESRUISSEAUX
Law Offices of
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone (702) 383-0701
(702) 384-4012

CERTIFICATE OF SERVICE VIA EFP PROGRAM

I hereby certify that on this 14th day of December, 2009, I did serve, via the Court's CM/ECF System, a copy of the above and foregoing DEFENDANTS RE/MAX EXTREME, EDWARD C. REED AND BARBARA P. REED'S MOTION TO DISMISS:

Steven A. Gibson, Esq.
J. Scott Burris, Esq.
GIBSON LOWRY BURRIS, LLP
7201 West Lake Mead Boulevard, Suite 503
Las Vegas, Nevada 89128
702-541-7899 fax
Attorneys for Plaintiffs

/s/ Andrea Flintz
An employee of OLSON, CANNON,
GORMLEY & DESRUISSEAX

Law Offices of
OLSON, CANNON, GORMLEY & DESRUISEAUX
A Professional Corporation
9350 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701